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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

197

No. 197.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CROMPTON-HIGHLAND MILLS, INC.

BRIEF OF
CROMPTON-HIGHLAND MILLS, INC.,
In Opposition to
Petition for a Writ of Certiorari.

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INTRODUCTORY STATEMENT OF THE CASE.

The events here involved occurred between the dates of August 31, 1945, and January 1, 1946.

The hearings before the Trial Examiner of the National Labor Relations Board were held on February 20 and 21, 1946 (R. 70). The Intermediate Report of the Trial Examiner was issued on March 25, 1946 (R. 104), and the

Board, issued its decision and order on August 21, 1946 (R. 64).

The petition for enforcement of the Board's order was filed more than a year later, on December 8, 1947 (R. 1). The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on May 5, 1948 (R. 127). The petition for a writ of certiorari was filed on August 4, 1948, and served on August 16, 1948, more than ten days after the date of filing. (See Par. 3 of Rule 38.)

The case presented by the petition for certiorari is an imaginary one, only slightly related to the facts which actually occurred.

The opinion of the Circuit Court was inadequate and in some unnecessary respects inappropriate. The petition for certiorari and supporting brief are skillfully misleading.

We shall endeavor to demonstrate that the judgment of the Circuit Court, denying enforcement of the Board's order, was entirely correct and that there is no warrant or occasion for a writ of certiorari.

ONLY QUESTION PRESENTED.

Only one question of substance is presented, and the purported statement of it in Paragraph 1, page 2, of the petition for certiorari is inaccurate and misleading.[1]

[1] Other questions of substance, including (1) an issue of fact as to whether the complained of wage increase was made without consulting the Union; (2) Respondent's contention that the Union, by bargaining for its personal interests and advantages to the exclusion of bargaining for the interests and advantages of the employees, had so abandoned its agency responsibilities that it had forfeited its agency authority; and (3) an issue as to whether the order of the Board, if enforced, should be modified so as to restrict it to the only unfair labor practice found to have been committed, were presented to the Circuit Court of Appeals, but are not regarded as directly pertinent to the present investigation.

The question presented is more accurately stated as follows:

Whether Respondent refused to bargain with the Union by unilaterally increasing its wage rates on January 1, 1946, after collective bargaining negotiations, which commenced on August 31, 1945, and continued with more than usual success until October 17, 1945, had been broken off and terminated by the Union, without fault of Respondent, first on October 18, 1945, again, after resumption, on November 8, 1945, and finally and completely on December 19, 1945; and where no further collective bargaining negotiations were pending, requested or anticipated at the time said wage increase was made, and Respondent had unquestionably demonstrated a willingness to bargain in complete good faith whenever requested to do so, and the wage increase was essential to the maintenance of Respondent's position in a highly competitive labor market.

Or, to the same effect:

Can Respondent be held to have refused to do what it was not requested or under any duty to do?

The purported statement of said question in Paragraph 1, page 2, of the petition for certiorari is inaccurate and misleading, because more than an "impasse in bargaining negotiations" occurred, and because said statement implies, contrary to fact, that the bargaining negotiations broke down on the wage issue.

Actually, the Union, without fault of Respondent, completely terminated the bargaining negotiations, without indicating any intention of ever resuming them (infra pp. 9-11), solely because Respondent would not agree to compel the employees to maintain membership in and pay dues to the Union (infra pp. 11-16). Respondent, notwithstand-

ing the threatened strike, had resumed bargaining, and had demonstrated a willingness to bargain in complete good faith, whenever requested to do so (infra pp. 16-17). Respondent was not under any duty to, and the Union, after its final termination of the bargaining negotiations, did not request any resumption of the negotiations; and no further bargaining negotiations were pending, requested or anticipated when the wage increase was granted (infra pp. 9-11, 17-22).

Other Questions Stated by Petitioner.

As fully appears from the facts and arguments hereinafter stated and set forth, the questions stated in paragraphs 2 and 3, pages 2-3, of the petition for certiorari, while somewhat attuned to certain dicta in the opinion of the Circuit Court, are not at all relevant to the facts of the case or to the actual judgment of the Circuit Court.

The answer to both questions is so obviously "no," that no occasion for a writ of certiorari exists on account of them.

ADDITIONAL STATEMENT OF THE CASE.

Proper evaluation of the issue presented requires a realization that most of the hearings before the Trial Examiner (see Appendix to Board's Brief in the Circuit Court) and most of the Intermediate Report of the Trial Examiner (R. 69-104)[2] were devoted to the Union's contention that Respondent did not bargain in good faith with respect to a controverted incentive wage plan. This was natural because it was generally acknowledged (R. A. 13)

[2] References to the printed record are designated "R." References to evidence printed in Respondent's brief in the Circuit Court are designated "R. A." The appendix to Respondent's brief in the Circuit Court was printed at the end of said brief.

that the installation of the incentive wage plan had precipitated the organization of the Union.

The Trial Examiner purported to find:

(a) That Respondent did not bargain with the Union in good faith with respect to the incentive wage plan; (b) that Respondent interfered with, restrained and coerced its employees in violation of Section 8 (1) of the National Labor Relations Act; and (c) that Respondent refused to bargain with the Union, in violation of Section 8 (5) of said Act, by increasing its wage rates on January 1, 1946, "without consulting the Union."

The Board found:

(a) That Respondent bargained with the Union in complete good faith with respect to the controverted incentive wage plan (R. 61-62),[3] and (b) that Respondent did not interfere with, restrain or coerce its employees in violation of Section 8 (1) of said Act (R. 62 and 110).

The Board predicated its decision and order solely upon its affirmance of the Trial Examiner's finding that Respondent refused to bargain, in violation of Section 8 (5) of said Act, by increasing the wage rates of its employees on January 1, 1946, without consulting the Union (R. 60, 61-62).[3]

---

[3] The pertinent portions of the decision of the Board are quoted as follows, to-wit:

(R. 60) "1. The Trial Examiner found that the respondent, in violation of Section 8 (1) and (5) of the Act, failed to bargain collectively with the Union as the statutory representative of the respondent's employes by refusing to furnish the Union with certain detailed information relating to the incentive wage plan and by granting a wage increase to its employees without consulting the Union. Although we agree with the Trial Examiner's conclusion, we, however, rest our determination solely on the latter ground."

(R. 61-62) "With respect to the respondent's refusal to comply with the Union's request for certain information concerning its Point Plan, we, unlike the Trial Examiner, are not persuaded that, on the

It is against this background that the issue presented should be considered. Any unwillingness to bargain in good faith would have certainly been manifested in connection with the bargaining with respect to the incentive wage plan which had precipitated the organization of the Union; and the Board found that Respondent bargained in good faith with respect to the controverted incentive wage plan. The absence of any basis for the customary, almost automatic, 8 (1) charges of interference, is also significant; and against this background, it is most significant that the petition to enforce the Board's order was not filed until sixteen months after the date on which the Order was issued.[4]

RESPONDENT'S EXHIBITS 3, 4 and 2.

We do not ask the Court to pass upon any controverted issues of fact.

However, full appreciation of the fact that Respondent bargained with the Union in complete good faith is essential to a consideration of the issue presented; and the fact that Respondent did bargain with the Union in complete good faith in a sincere effort to agree upon a contract, cannot be appreciated fully without an examination of Respondent's Exhibits 3, 4 and 2 (Exhibit 2 was identified

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facts of this case, the respondent thereby manifested bad faith. In view of the respondent's invitation to the Union to conduct its own engineering studies at the plant, and under all the circumstances of this particular case, including the evidence of substantial counter-proposals on many other issues, we find that this part of the respondent's conduct was not violative of Section 8 (5) of the Act. The effect of such conduct in a different context is not before us for decision here."

See also amendment of Board's order, R. 110.

4 Respondent alleged, and prayed that the Circuit Court provide it appropriate opportunity to prove, that Respondent had, in the meantime, initiated bargaining with respect to two general wage increases, and had agreed with the Union upon a complete contract, minus Union security and check-off, which Respondent had offered to sign and which the Union had refused to sign (R. 119 at 121; pp. 39-58, Respondent's brief in the Circuit Court).

out of order at the request of the Board's attorney, R. A. 5-7).

These exhibits are not included in the printed record, but are on file in the Office of the Clerk of the Supreme Court.

The rules of the Fifth Circuit Court of Appeals require that all oral and documentary evidence relied upon by either party be printed in the appendix to the brief of said party. Because these exhibits, with all the interlineations, deletions and attached riders, would have been extremely expensive to print, and because, in printed form, these exhibits would be much less informative than they are in the form in which they were introduced in evidence and certified to the Circuit Court by the Labor Board, the Circuit Court granted Respondent's request (pp. 4-6 of Respondent's brief in the Circuit Court) that the original exhibits be examined and considered by the Court although not printed in the appendix to Respondent's brief.

By order of Judge Samuel H. Sibley, one of the Judges of the Fifth Circuit Court of Appeals, the Clerk of that Court has certified said exhibits as a part of the documentary evidence which was considered by the Circuit Court, and has forwarded the original exhibits to the Clerk of the Supreme Court.

Respondent respectfully and earnestly asks that Respondent's Exhibits 3, 4 and 2, which, as originally introduced in evidence, are now on file in the office of the Clerk of the Supreme Court, be examined and considered by the Court. If this request be not granted, Respondent begs leave and time to obtain photographic copies of said exhibits for distribution by the Clerk to the several Justices before the petition for certiorari is acted upon. Obtaining photographic copies will involve an expense of several hun-

dred dollars which Respondent would like to avoid, but will incur if necessary.

The referred to exhibits are a graphic account of the bargaining negotiations. **Respondent's Exhibit 3** is a copy of the contract which Respondent proposed to the Union at the first bargaining conference on August 31, 1945. The interlineations, deletions and attached riders show the concessions and alterations which were agreed upon in collective bargaining, and the marginal dates show the course and sequence of the bargaining (R. A. 5-6).

So many changes in Respondent's original proposal were agreed upon in collective bargaining that the bargaining representatives of both parties encountered difficulty in keeping up with them. To facilitate further bargaining, Respondent prepared, and, on October 12, 1945, presented to the Union, a memorandum of the contract provisions which had, up to that time, been agreed upon, and of Respondent's proposals as to the provisions which had not been agreed upon (R. A. 6-7). **Respondent's Exhibit 4** is a copy of this memorandum. The typewritten marginal dates are the same as the marginal dates on Respondent's Exhibit 3, and show the course and dates of the agreements made in collective bargaining prior to October 12, 1945. The interlineations, deletions and attached riders, and the red pencil marginal dates, reflect the course of the bargaining and the agreements reached in bargaining after October 12, 1945 (R. A. 6-7).

Respondent's Exhibit 2 is a copy of an amendment of Respondent's proposals which Respondent verbally proposed to the Union on October 18, 1945, and formally submitted to the Union on November 7, 1945, to meet all objections which the Union had voiced with respect to Respondent's proposals regarding the incentive wage plan (R. A. 7).

We confidently believe that examination of these three exhibits, and the facts hereinafter stated, will convince the Court that Respondent sincerely tried to agree with the Union upon a contract, and that Respondent bargained with the Union, in the utmost good faith, as long as, and longer than, the Union was willing to bargain with Respondent, and until the Union broke off and finally terminated the bargaining negotiations.

CORRECTION OF PETITIONER'S STATEMENT OF FACTS.

The statement of facts in the petition for certiorari (pp. 4-13) entirely omits mention of the facts which are controlling, and skillfully distorts the facts which are stated.

Appreciation of the facts hereinafter set forth is essential to consideration of the issue presented.[5]

1) The collective bargaining negotiations which began on August 31, 1945, and which continued with more than usual success until October 17, 1945, were broken off and terminated by the Union, without fault of Respondent, first, on October 18, 1945, again, after resumption, on November 8, 1945, and finally and completely, without any indicated intention of or subsequent request for resumption, on December 19, 1945.

Neither the Trial Examiner nor the Board made any clear-cut finding of fact as to when, why or by whom the bargaining negotiations were terminated, although these were clearly controlling issues in the case. The Board simply said (R. 113): "Nor are we impressed with the respondent's attempted justification for its action on the ground that the Union broke off negotiations on Decem-

[5] The ultimate facts relied upon are printed in bold type, with substantiating facts in regular type.

ber 19, and that the respondent was therefore relieved of the obligation to deal with it."

In the absence of a clear-cut finding of fact, this was, we submit, an admission, and tantamount to a finding that the Union did break off and finally terminate the bargaining negotiations on December 19, 1945. The uncontradicted, fully corroborated testimony demanded such a finding.

Respondent's witnesses testified positively that the bargaining negotiations were terminated by the Union first on October 18, 1945; again, after resumption, on November 8, 1945, and finally and completely, without any intention of resumption, on December 19, 1945. (R. A. 16, 27-28, 31-32, 19-20, 29-33, 24, 29, 33). This testimony was uncontradicted and, as to the final termination on December 19, 1945, was fully corroborated by the testimony which was elicited by the Trial Examiner from Mr. Douty, "the Union's chief negotiator" (Petition for certiorari, p. 11), as follows (R. A. 10), to-wit:

> "Q. (By Trial Examiner Rogosin): Mr. Douty, was December 19 the date of your last bargaining conference with the company in this case?
>
> A. Yes, sir.
>
> * * * * * * *
>
> Q. Well, what was the position of the parties at the conclusion of that conference on December 19? **Was it contemplated that the parties should meet again with respect to wage proposals?**
>
> A. **Not particularly.** I mean, we broke up not having reached agreement on these points, and our situation at the end of the meeting was one of stalemate on these particular points in dispute." (Emphasis added.).

Considering the issues and his interests, Mr. Douty could not have been expected to more forthrightly admit that the negotiations were completely and finally termi-

nated on December 19, 1945, and that no further negotiations were then contemplated.

Neither the Union nor the Board has ever contended, nor does the Petitioner for certiorari contend, that any resumption of negotiations was requested, or that any desire or intention to resume negotiations was in any way indicated, between December 19, 1945 and January 1, 1946.

The fully established facts that the Union finally and completely terminated the bargaining negotiations on December 19, 1945, and that no further bargaining negotiations were thereafter contemplated or requested, fully sustained the only necessary predicate for the judgment of the Circuit Court (*R.* 125), to-wit, "It appears however to be undisputed in the evidence of Mr. Douty, the representative of the Union in the State, that when the wage increase was granted, collective bargaining negotiations had broken down, **the Union had withdrawn from further bargaining** in connection with the matter, and a strike vote had already been called."[6] (Emphasis added.)

2) **The bargaining negotiations were terminated by the Union, as above set forth, solely because Respondent refused to compel the employees to maintain membership in and pay dues to the Union.**[7]

As above stated, the Board did not make any clear-cut finding as to why the bargaining negotiations were terminated. The uncontradicted and fully corroborated evidence admits of but one answer.

a) The Union became convinced, for the first time, on October 17, 1945, that Respondent was not going to compel

[6] The reference to the strike vote was inappropriate to the issue presented, and unnecessary to the judgment entered (infra, pp. 16-17).

[7] This fact, while illustrative of the merits of the case, is not an ingredient of the question presented and is not essential to Respondent's contention. The substantiating facts here set forth also substantiate the ultimate fact stated at page 16 below, and are designated (a), (b), (c), (d) and (e) to facilitate reference and avoid repetition.

the employees to join, or to remain members of, or to pay dues to, the Union (R. A. 14-15); and Respondent's Exhibits 3 and 4 demonstrate, in clear focus, that bargaining progress, which up to then had been more than usually successful, ended right there.

The conference on October 18, 1945, was devoted primarily to discussion of "Union security" and the incentive wage plan (R. A. 15-16). Mr. Douty led the discussion for the Union with respect to Union security and Mrs. Kanun, who testified that she was in charge for the local Union of the wage negotiations, led the discussion of the incentive wage plan (R. A. 1-2). Just as Mr. Douty was about to terminate the conference, Mrs. Kanun realized, for the first time, that Respondent was offering to guarantee earnings under the incentive wage plan against reduction during the term of the contract (R. A. 15-16). Mrs. Kanun thereupon said to Mr. Douty, in the presence of Respondent's representatives, "I think we had better go into this wage matter further," to which Mr. Douty replied, "There is no sense in talking about it any further" (R. A. 16).

Mr. Douty thereupon, and again on November 8, 1945, and December 19, 1945, informed Respondent that the International Union would not permit the local Union to sign any contract, irrespective of its other provisions, which did not, to the satisfaction of the International Union, bind the employees to maintain membership in and pay dues to the Union (R. A. 15, 19, 21, 27-33)[8]; and, with that explanation, Mr. Douty terminated the October 18, 1945, conference and informed Respondent that the Union intended to call a strike (R. A. 16). A strike notice, as then required by the War Labor Disputes Act, was issued and served four days later, on October 22, 1945 (Petition for certiorari, p. 7).

[8] Mr. Douty denied having made these statements, but all other facts herein stated were uncontradicted.

b) The only objections expressed by the Union to Respondent's initial proposals with respect to the incentive wage plan (Respondent's Exhibit 4, Article II, Section 3, p. 3) arose from Respondent's insistence that disputes arising under said wage plan should be adjusted through collective bargaining and the Union's insistence that such disputes should be settled by arbitration (R. A. 17-18).

At the conference on November 7, 1945, Respondent formally submitted to the Union (Respondent's Exhibit 3, Section 3, at the next to the last page) a proposal to arbitrate all such disputes. Respondent also submitted to the Union a schedule of the wage rates and average hourly earnings under said wage plan which the Union had requested. The Union rejected the amended proposal without reading it, and, without looking at it, said that the schedule of wage rates and earnings was unsatisfactory and unconvincing (R. A. 16-18).

c) At the conference on November 8, 1945, Mr. Douty, for the Union, proposed to Respondent that the Union would support the controverted incentive wage plan (opposition to which had admittedly precipitated the organization of the Union) (R. A. 13) if Respondent would include in the contract provisions requiring the employees to maintain membership in and pay dues to the Union; and stated that the Union would do everything in its power to discredit and destroy the incentive wage plan unless Respondent would include such provisions in the contract. Respondent rejected the proposal.[9]

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[9] Respondent's witnesses all testified to the facts above set forth (R. A. 19-20, 28, 32). Four of the eight employee members of the Union Bargaining Committee took the stand in rebuttal, but none of them contradicted this testimony. Mr. W. J. Moore, an employee member of the Union Bargaining Committee, corroborated Respondent's testimony in this regard (R. A. 36). The Trial Examiner did not make any findings of fact with respect to this corroborated testimony, and the Board entirely ignored Respondent's Exceptions, on that account, to the Intermediate Report of the Trial Examiner (R. 24, 47-48).

d) At the suggestion of the Conciliator, by whom the conferences held on November 7 and 8, 1945, were convened, Respondent offered to facilitate payment of dues to the Union by issuing to each employee two checks, one for the amount of the Union's dues and the other for the balance of the employees' wages; and to provide, in each department of the Mill facilities for endorsing and delivering the first checks to the Union, including a stamp for endorsement to the order of the Union, and a locked box for depositing the checks for delivery to the Union (R. A. 22-23). Respondent was willing to make it easy for the employees to pay dues to the Union, but Respondent was unwilling to force the employees to do so. The Union rejected the above offer, and insisted that the checks for the amount of its dues be drawn directly to its order, so as to avoid the possibility that the employees might refuse to endorse the checks and deliver them to the Union (R. A. 22-23).

e) One of the questions still at issue pertained to the appointment of an arbitrator under the grievance procedure (Respondent's Exhibit 4, p. 18). Respondent had proposed that the arbitrator be named by either of the Judges of the United States District Court for the Northern District of Georgia. The Union had insisted that the arbitrator be named by the Commissioner of Conciliation of the United States Department of Labor. When, on November 8, 1945, Respondent sought to obtain agreement on this disputed issue, the Union stated that it could not make a contract in that regard unless Respondent would agree to include in the contract satisfactory union security and check-off provisions (R. A. 30).

In this situation no bargaining progress was or could have been made. Respondent was sincerely trying to agree with the Union upon a contract, and therefore offered to

make substantial concessions from its previous bargaining insistencies; but the Union's adamant insistences upon contract provisions to protect the Union against the anticipated unwillingness of the employees to maintain membership in and to pay dues to the Union, to the complete exclusion of any bargaining with respect to any other provisions of the contract, precluded any possibility of further bargaining progress.

The Union's termination of the bargaining on October 18, 1945, was regarded by Respondent as bargaining strategy (R. A. 16). The Union's termination of the bargaining on November 8, 1945, was purportedly final and no further bargaining was then anticipated (R. A. 20). Respondent nevertheless resumed bargaining when requested to do so on December 19, 1945 (R. A. 20-21).

Without repeating the details, the situation which existed on November 7 and 8, 1945, also prevailed at the conference which was held on December 19, 1945. Mr. Douty, for the Union, persisted in his refusal to consider or discuss any of the proposals which Respondent had submitted (R. A. 21, 28-29, 32-33) and, in terminating the December 19, 1945 conference, again informed Respondent that the Union would not agree to any contract, and that further negotiations would be a waste of time, unless Respondent would include in the contract provisions which would require the employees to maintain membership in and pay dues to the Union (R. A. 24, 29, 33, 21, 28-29, 32-33); and Mr. Douty testified that no further bargaining negotiations were contemplated when the Union terminated the negotiations, for the third time, on December 19, 1945 (infra, p. 10).

We submit that the bargaining negotiations were terminated by the Union solely because Respondent would not

agree to force any of the employees to maintain membership in and pay dues to the Union; and that the inference throughout the petition for certiorari that the bargaining negotiations broke down on the wage issue, is completely contrary to fact and unjustified. The Board, as stated, did not make any finding as to why the bargaining negotiations were terminated.

3) **Respondent continued to bargain with the Union in complete good faith notwithstanding the threatened strike.**

Substantiation of this statement requires only a repetition or re-consideration of the facts set forth in paragraphs (b)-(e), (pp. 13-14) above, with respect to the reasons why the Union terminated the negotiations; and we will rely upon a re-consideration of said facts by the Court rather than a repetition of them herein.

Verbal notice of the intent to strike was given at the termination of the conference on October 18, 1945, and the required formal notice of intent to strike was issued and served on October 22, 1945.[19]

Respondent, upon request, readily resumed negotiations on November 7 and 8 and again on December 19, 1945; and as above shown [pp. 13-14, paragraphs (b)-(e)], made substantial concessions from its previous bargaining incstencies.

No further bargaining progress was made solely because the Union had, by then, abandoned all pretense of bargaining for the advantages of the employees and was concerned

[19] The strike commenced on April 18, 1946, after another increase had been agreed upon in bargaining initiated by Respondent (R. 121) and was abandoned by the employees on August 26, 1946, following the decision of the Board on August 21, 1946, that Respondent had bargained with the Union in good faith with respect to the incentive wage plan and had only committed an unfair labor practice by increasing the wage rates of the employees without consulting the Union.

only with its fears that the employees, unless compelled to, would not maintain membership in or pay dues to the Union.

The references in the opinion of the Circuit Court to the strike vote were inappropriate to the facts of the case and unnecessary to the judgment entered. The effort in the petition for certiorari and supporting brief to focus attention upon this inappropriate and unnecessary part of the Circuit Court's opinion is clever, but does not justify a writ of certiorari to review a judgment which, on the true facts, was entirely correct.

4) Respondent bargained with the Union in good faith with respect to wages and the situation complained of would have been avoided if the Union had accepted Respondent's wage proposals.

The bargaining negotiations had been completely and finally terminated by the Union, and no further bargaining negotiations were pending, requested or anticipated, when Respondent, because of changed conditions, increased its wage rates in order to maintain its competitive position in the labor market area.

Employee opposition to the recently installed incentive wage plan admittedly precipitated the organization of the Union, and the incentive wage plan was therefore the most important focal point for wage negotiations (R. A. 13). The Board, reversing the Trial Examiner, found and held that Respondent bargained with the Union in good faith, with respect to the incentive wage plan (R. 60, 61-62, infra, p. 5).

No union, however intent upon insuring continuation of its own membership and the check-off of its own dues, would be foolish enough to let that appear to the em-

ployees to be the only bargaining issue. Before this Union broke off and terminated the bargaining negotiations as above set forth, it therefore repeatedly proposed a wage increase of 5¢ per hour.

Throughout the bargaining negotiations, from August 31, 1945, through December 19, 1945, Respondent refused to grant any wage increase.[11]

Each time a wage increase was requested, Respondent fully explained and justified its unwillingness and refusal to grant a wage increase by demonstrating to the Union that the wages which it was then paying were already higher than the wages then being paid by the other comparably situated mills (R. A. 2-4, 8-10, 13-14, 34) and were higher in fact than the "permissible rates" or "guide rates" which had just recently been established by the War Labor Board for Southern textile mills (R. A. 2-4, 8-10, 13-14, 34).

As a part of each such discussion, Respondent also reminded the Union that Respondent had always been among the first of the comparably situated mills to make any

[11] Shortly before the organization of the Union, Respondent, with War Labor Board approval, made general wage increases aggregating 10¢ per hour. The War Labor Board insisted that these increases be added as hourly rates to the earnings under the incentive wage plan, and refused to permit Respondent to work these increases into its incentive rates because the resulting increases in incentive earnings would have exceeded the increases which the Board was then permitting textile mills to make.

When the parties met on December 19, 1945, wage controls had been lifted, and Respondent therefore offered to work these increases into the incentive rates. The effect would have been to increase the average incentive earnings approximately 2¢ per hour.

Respondent did not make this offer as or in lieu of a general increase. Respondent still proposed contract provisions for further bargaining with respect to wages at any time and reiterated the promise that it would increase its rates whenever the other mills with which it competed increased theirs.

This offer could have been accepted without prejudice to further bargaining as proposed by Respondent. It was rejected because the Union was by then bargaining for its own security to the exclusion of bargaining for the benefit of the employees, and the Union was afraid that any increase in earnings would lessen interest in the strike which the Union was trying to promote.

wage increase, and assured the Union that Respondent would increase its wage rates whenever and as soon as the other mills in the locality increased theirs (R. A. 2-4, 8-10, 13-14, 34).

The possibility of a general increase in wage rates throughout the textile industry, particularly in the South, was then contemplated and discussed and Respondent offered to provide in the contract that the contract might be reopened for further bargaining with respect to wages at any time (R. A. 4, 9-10, see also Section 2 of Article II, of the contract proposed to the Union by Respondent, Respondent's Exhibits 3, 4 and 2). This is important, and the fact that no mention was made of it in the petition for a writ of certiorari is indicative of the effort of the petitioner to mislead the Court.

This, plus the fact that Respondent had offered to arbitrate all disputes arising under the incentive wage plan, was the situation which existed with respect to wages when the Union terminated the bargaining negotiations as above set forth.

Not long after the Union terminated the bargaining negotiations, a general wage increase of 5¢ per hour spread like wild fire throughout the textile industry in the Southern states (R. A. 24-25, 33-34).[12] While the possibility of such an increase had been anticipated, neither party had had any inkling that it would come so quickly. The fact that Respondent first learned of the increase at the end of the week preceding January 1, 1946 (which is to say, on or about December 29 or 30, 1945) is uncon-

[12] The Board expressed the opinion (R. 61), contrary, we submit, to its express findings quoted at page 4 above, that the January 1, 1946 wage increase, coming so quickly after the termination of bargaining negotiations, indicated that Respondent was not acting in good faith during the negotiations. Petitioner, note 12, page 26, of the petition for certiorari, expressly disclaims any reliance upon the refusal of the Circuit Court to agree with this opinion; and no issue in that regard is presented by the petition for certiorari.

tradicted (R. A. 33-34). If the Union, through its contact with other mills, had any advance notice of the increase, it did not impart the information to Respondent.

The textile industry is the principal industry in the closely-knit Griffin, Georgia, labor market area; the demand for greatly exceeded the supply of qualified workers; and the competition for employees was keen (R. A. 24-25, 33-34). In order to maintain its competitive position in the labor market, it was necessary that Respondent immediately make substantially the same increase as was being made by the other mills in the locality (R. A. 24-25; 33-34). It so happened that the increase generally being made at that time was substantially what the Union had requested before it terminated the bargaining negotiations.

As a courtesy, not a duty, Respondent sent for the President and other Bargaining Committeemen of the Local Union and informed them in detail of the wage increase which it was about to announce (R. A. 34-35). Respondent also mailed detailed schedules of the increase to Mr. Douty, the Georgia Director of the International Union [Board's Exhibit 12 (A-F); BA 130-135]. The President and Bargaining Committeemen of the Local Union expressed approval of and appreciation for the increase (R. A. 34-35). No one requested further bargaining.[13]

There was no reason during the bargaining negotiations, from August 31, 1945, through December 19, 1945, why

[13] Respondent does not wish to raise any issue of fact at this time. Respondent contended in the Circuit Court that the Board's finding of fact, that the increase was made without consulting the Union, was unjustified. If the January 1, 1946 wage increase would have afforded any basis for closing the contract, it seems reasonable to assume that the Union would have requested a resumption of negotiations as soon as it learned that the wage increase was being made. If the January 1, 1946 wage increase would not have afforded any basis for closing the contract, there was no conceivable need or purpose for Respondent to do anything more than inform the Union that it had, because of increases being made throughout the industry, determined to make the increase which the Union, during bargaining, had requested.

Respondent should increase its wage rates, which were already higher than the rates being paid by the mills with which it competed for labor (R. A. 2-4, 8-10, 13-14, 34). There was every reason why Respondent should, as it wanted to do and did do, maintain its position of paying rates a bit higher than the rates paid by its competitors and its reputation of always being among the first of the mills to increase wages (R. A. 24-25, 33-34). Getting employees back, even if possible, is never as good as keeping them satisfied, and time was of the essence of the purpose of the increase which Respondent made.

The Union and not Respondent was responsible for the situation which then existed. Respondent had fully explained and justified its refusal to increase its wage rates which were already higher than the rates being paid by its competitors, and higher in fact than the War Labor Board was then permitting comparably situated mills to pay; and Respondent had assured the Union that it would increase its rates as soon as its competitors increased theirs; and Respondent had diligently endeavored to persuade the Union to close the contract with a provision whereby the contract could be re-opened for further bargaining with respect to wages at any time.

If the Union had closed the contract as proposed and urged by Respondent, the contract would have been re-opened for further bargaining with respect to wages when the anticipated industry-wide wage increase occurred; and the situation complained of would have been avoided. The trouble was that the Union was so intent upon obtaining security for itself that it had completely abandoned its duty to bargain for the benefit of the employees whom it was supposed to represent, and it therefore broke off and completely terminated the bargaining negotiations as above set forth.

Because of the Union's action, and through no fault of Respondent, no further bargaining negotiations were pending, requested or anticipated when Respondent, in order to maintain its competitive position in the labor market, made the wage increase which is here complained of.

"THE PROCEEDING IN THE COURT BELOW."

The quotations from Respondent's answer to the Board's petition for enforcement and from Respondent's brief in the Circuit Court, which are set forth under the above caption at p. 16 of the petition for certiorari, are incomplete and are therefore misleading. Respondent respectfully requests that the Court compare the quotation from its answer with the appropriate paragraph of the answer appearing at page 121 of the Record, and the quotation from its brief with the two paragraphs commencing at the bottom of page 49 of the brief.[14]

"SPECIFICATION OF ERRORS TO BE URGED."

The "errors" specified at pp. 17-18 of the petition for certiorari are not relevant to the facts or merits of the case, and therefore do not warrant the issuance of the writ prayed for.

1. The Court did not hold that a mere impasse in bargaining negotiations authorizes an employer to institute unilateral changes in rates of pay. The Court, on the facts of this case, correctly held that Respondent did not refuse to bargain by increasing its wage rates after the Union had completely terminated the bargaining negotiations, "had withdrawn from further bargaining," and where no further bargaining negotiations were pending, requested or

[14] The appendix to Respondent's brief in the Circuit Court was printed with the brief, and the brief is therefore on file in this Court.

anticipated when the wage increase was granted. The Court simply held, in effect, that Respondent could not refuse to do what it was not requested to do.

2. Nor did the Court hold that the taking of a strike vote authorizes an employer to effectuate unilateral changes in rates of pay. Respondent bargained with the Union in good faith after and notwithstanding the notice of intent to strike, and made substantial concessions from its previous bargaining insistencies in its effort to reach agreement with the Union on a contract (infra, pp. 16-17). The incidental reference to the strike vote in the opinion of the Circuit Court was not appropriate to the facts of the case or necessary to the judgment entered.

3. Nor did the Court hold that anticipated wage increases by competitors in the labor market authorize an employer to effectuate unilateral changes in the rates of pay. The Court, on the facts of this case, simply held that where collective bargaining negotiations have been terminated by the Union without fault of the employer, and no further bargaining negotiations are pending, requested or anticipated, an employer may unilaterally increase its wage rates so as to maintain its position in a competitive labor market.

4. Paragraph 4 is a mere generalization which does not merit comment.

5 and 6. Respondent did not contend, and the Court did not hold, that the Board's order should not be enforced because it had already been complied with. Respondent expressly disclaimed any such contention (pp. 49-50 of Respondent's Brief in the Circuit Court). Respondent contended and the Court held that the Board's order should not be enforced because it should not have been issued.

Respondent also contended, as a further reason why the order should not be enforced, that the post-hearing conduct of the Union had precluded the possibility of further bargaining and had therefore relieved Respondent of any duty to comply with the order; and Respondent requested appropriate opportunity to prove the facts alleged. The portion of the opinion of the Circuit Court which is introduced by the phrase, "and in the light of the earnest assertion by Respondent," is obviously dicta which was not appropriate to the issue presented or necessary to the judgment entered.

Certiorari should not issue to correct mere dicta in an opinion issued in connection with a perfectly sound judgment, especially not where it is obvious that the dicta will not ever have any precedent value.

7. Paragraph 7 is also a mere generalization which does not merit comment.

THERE IS NO CONFLICT OF DECISIONS ON THE ONLY QUESTION OF SUBSTANCE PRESENTED.

Respondent respectfully submits that the only question of substance is clearly stated at page 3 above; and that as to it there is no conflict of authority.

There must be a request to bargain before there can be a refusal to bargain. Respondent cannot properly be held to have refused to do what it was not requested or under any duty to do.[15]

The Union first terminated the bargaining on October 18, 1945. Respondent was requested to resume bargaining on

[15] N. L. R. B. v. Columbia Enameling Co., 306 U. S. 292, 298; and N. L. R. B. v. Sands Mfg. Co., 306 U. S. 332, 344; infra, pp. 28-29.

November 7, 1945, and it did so (infra, p. 16). If it had not, it would have been guilty of a refusal to bargain. Respondent was anxious to complete the contract, and it therefore not only resumed bargaining, but, in a sincere effort to reach agreement, made substantial concessions from its previous bargaining insistencies [infra, pp. 13-14, Pars. (b)-(e)].

The Union terminated the bargaining again on November 8, 1945; and Respondent, upon request, resumed bargaining again on December 19, 1945 (infra, p. 16).

The Union terminated the bargaining again, this time finally and completely, on December 19, 1945. No request to resume bargaining was thereafter made, nor was any desire or intention on the part of the Union to thereafter resume bargaining in anywise indicated (infra, pp. 9-11).

No further bargaining was pending, requested or anticipated, when the complained of wage increase was granted.

Respondent had repeatedly assured the Union that it would increase its wage rates whenever its competitors increased theirs and Respondent had urged the Union to close the contract with a provision for further bargaining with respect to wages at any time.

The industry-wide increase which had been anticipated during the bargaining negotiations occurred. The Union, through its contacts with other mills, knew of the industry-wide increase as soon as, if not sooner than, Respondent did, and the Union had no reason to doubt the assurances which Respondent had repeatedly given it.

The Union had terminated the bargaining and if further bargaining was desired, the Union should have requested it. If was not up to Respondent to seek out the

Union and request a resumption of the negotiations which the Union had terminated.

None of the decisions cited in the brief in support of the petition for certiorari are at all applicable to this situation.

In **May Department Stores Company v. National Labor Relations Board, 326 U. S. 376,** the unilateral wage increase was simply a part of a prevailing refusal to recognize the Union, and an unauthorized refusal to bargain with a union which was diligently asserting and trying to exercise its bargaining authority. The Union in that case had been and was doing everything which it could do to bring about contract negotiations. The best that can be said of the company, in that case, is that it was refusing to bargain because it erroneously disputed the Board's determination of the appropriate unit. In truth, the total circumstances, including the method of publicizing the company's application to the War Labor Board, clearly indicated a pervading refusal to respect the rights of the employees to organize as provided by the National Labor Relations Act.

There is, we submit, no similarity between the facts of the May Department Stores case and the facts of the case now before the Court; nor is there any conflict between the decision in that case and the judgment of the Circuit Court which is here attacked.

There is, if possible, even less conflict between the judgment here attacked and the decision of the Fourth Circuit Court of Appeals in **Jeffery-DeWitt Insulator Co. v. National Labor Relations Board, 91 F. 2d 134.**

In the cited case, the company refused an express request to bargain. The refusal to bargain was admitted.

The company attempted to justify it on the ground that an impasse in bargaining had occurred about a month earlier.[16]

The cited case would have been applicable if Respondent had refused to resume bargaining negotiations on November 7 and December 19 because of the terminations of bargaining which had occurred on October 18 and November 8; but the undisputed, completely distinguishing facts are, (1) that Respondent, upon request, resumed bargaining and bargained in good faith on November 7 and 8 and December 19, 1945, and (2) that no resumption of bargaining was requested, and that no desire or intention of the Union to resume bargaining was in anywise indicated, after the Union finally terminated the bargaining on December 19, 1945.

The only other citation in the brief in support of the petition for certiorari which is at all pertinent to the only question of substance presented, is the citation to the decision and order of the National Labor Relations Board in **Matter of Craddock-Terry Shoe Corporation, 73 N. L. R. B. 1339, 1342.**

While not necessary to our position, we make the point that certiorari is not called for by a conflict between a decision of a Circuit Court of Appeals and a decision and order of the National Labor Relations Board; otherwise, certiorari would be called for whenever a Circuit Court refused to enforce a Board order.

Actually, there is no conflict between the judgment here attacked and the decision and order of the Board in the Craddock-Terry Shoe Corporation case.

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[16] At p. 136, "In asking that the order be set aside, the company makes three contentions: . . . (2) that the company was not guilty of any unfair labor practice in refusing to negotiate further after an impasse had been reached in negotiations; . . ." See also headnotes 6-8, at pages 139-140, 91 F. 2d.

In the cited Board case, the Board found that "No impasse in bargaining had been reached" when the unilateral increase was announced. Actually, wage negotiations, initiated by the Union, had merely been postponed, at the request of the Company, to afford the Company an opportunity to study a War Labor Board Directive upon which the Union's wage proposals were based; and it was in this situation, so the Board found, that the Company, "motivated by a desire to undermine the CIO as the employees' representative," unilaterally made the wage increase which the Union had proposed and which the Company had requested time to consider. The situation here was entirely different.

To have enforced the Board's order in the case now before the Court, the Court below would have had to hold that it was up to Respondent to seek out the Union and request a resumption of the bargaining which the Union, without fault of Respondent, had terminated; which would have been expressly contrary to the Circuit Court's own decision in

N. L. R. B. v. Whittier Mills, 123 Fed. 2d 725,

and contrary, in principle, to the decisions of this Court in:

N. L. R. B. v. Columbia Enameling Co., 306 U. S. 292, at 298:

"To put the employer in default here the employees must at least have signified to respondent their desire to negotiate. Measured by this test, the Board's conclusion that respondent refused to bargain with the Union is without support, for the reason that there is no evidence that the Union gave to the employer . . . any indication of its willingness to bargain. . . . **The employer cannot, under the statute, be charged with refusal of that which is not proffered.**" (Emphasis added.)

And in

N. L. R. B. v. Sands Manufacturing Co., 306 U. S. 332, at 344:

> "There could be, therefore, no duty on either side to enter into further negotiations for collective bargaining in the absence of a request therefor by the employees."

Such a decision would have also conflicted in principle with numerous decisions of other Circuit Courts of Appeal[17] holding that the responsibility for initiating collective bargaining negotiations rests on the employees and the Union, and not on the employer.

We submit therefore that, as to the only question of substance presented, there is no basis for certiorari, but that there would have been if the decision contended for by the Petitioner had been rendered.

Other Decisions Cited by Petitioner.

The decisions cited by Petitioner at pp. 24-30 of the brief in support of the petition for certiorari relate to Petitioner's contentions with respect to the obviously inappropriate and unnecessary references, in the opinion of the Circuit Court, to the strike vote and to the post-hearing facts which Respondent alleged and prayed appropriate opportunity to prove.

Respondent did not contend in the Circuit Court, and will not ever contend, that the threatened strike relieved Respondent of the duty to continue to bargain with the

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17 Such as:

Great Southern Trucking Co. v. N. L. R. B., 127 F. 2d 180 (1), at 185;

Reliance Mfg. Co. v. N. L. R. B., 125 F. 2d 311, at 315;

N. L. R. B. v. West Kentucky Coal Co., 152 F. 2d 198 (2).

Union whenever requested to do so, or that enforcement of the Board's order should have been denied because the order had already been complied with. Respondent has at all times fully recognized the authority of the decisions cited by the Petitioner to these points, and there will be no occasion for any decision by this Court on these points if the prayed-for writ of certiorari is issued.

Respondent bargained with the Union in good faith, notwithstanding the threatened strike, whenever it was requested to do so (infra, pp. 16-17), and the attempted injection of the "strike vote" issue into this case is entirely artificial and wholly unrelated to the facts and merits of the controversy.

The same is true of the equally artificial issue as to compliance with the Board's order. Respondent emphatically stated in its brief to the Circuit Court (pp. 49-50 thereof) that it does not rely upon the fact, although it is a fact that the Board's order had been fully complied with before the petition for enforcement was filed (infra, p. 22).

Respondent contended in the Court below, as it contends here, that the January 1, 1946, wage increase did not constitute a refusal to bargain because the Union had, on December 19, 1945, finally and completely terminated the bargaining, without indicating any desire or intention to resume bargaining; and because no further bargaining was pending, requested or anticipated when Respondent, in order to maintain its position in the highly competitive labor market, made the wage increase complained of; and that the petition for enforcement should therefore be denied.

Respondent also contended, on the evidence in the record, that the Board's order should not be enforced because the Union, prior to January 1, 1946, so abandoned its agency

responsibilities that it forfeited its agency authority (R. 24, Par. II). This contention was not ruled on by the Board or the Circuit Court and no question with respect to it is presented by the petition for certiorari.

Respondent, relying upon and calling attention to the decision of this Court in **N. L. R. B. v. Jones & Laughlin, 331 U. S. 416, 91 L. Ed. 1575 (8) 1582,**[18] also alleged in its answer to the petition for enforcement (R. 119, 121 [5]), as a further and additional reason why said order should not be enforced, that the Union, after the hearings before the Trial Examiner and the issuance of the Board's order, had so completely frustrated and defeated Respondent's repeated and earnest efforts to bargain with the Union that Respondent should be relieved of any duty to further comply with said order; and Respondent prayed (R. 121) "that the Court hear, or provide for the taking of, evidence regarding the facts and matters alleged."

The Court below did not grant Respondent's prayer for leave to prove the post-order facts alleged; and no issue as to whether the Court should have done so, or as to whether enforcement of the order should have been denied after proof of said facts, is presented by the petition for certiorari.

The Circuit Court sustained Respondent's primary contention, and denied enforcement of the Board's order because "the Union had withdrawn from further bargaining" and no further bargaining was pending, requested or anticipated when the wage increase was granted, and because "under these circumstances it does not appear to be an unfair labor practice to grant a general increase in wages to the employees without consulting the Union."

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[18] "When circumstances do arise after the Board's order has been issued which may affect the propriety of enforcement of the order, the reviewing court has discretion to decide the matter itself or to remand it to the Board for further consideration."

We can only repeat that the portion of the opinion of the Circuit Court (R. 124, 126) which is introduced by the phrase "and in the light of the earnest assertion by the Respondent" is obviously mere dicta which was not appropriate to the issue presented or necessary to the judgment correctly entered; and that a writ of certiorari should not be issued on account of erroneous but unnecessary and inappropriate dicta, of no precedent value, where the judgment entered was entirely consistent with the decisions of this Court and of the other Circuit Courts, and correct.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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